STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v **Supreme Court No. 121564**

GREGORY PETTY,

Defendant-Appellee.

3rd Circuit Court No. 96-341045
Court of Appeals No. 219348
Related Court of Appeals No. 206849

PEOPLE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Table of contents

Page

Table of authorities ..... iii-vi

Statement of jurisdiction 1

Statement of questions presented 2

Summary of facts presented 3

Argument:

I. Neither the court rule nor the statute requires the trial court to make findings of fact on each enumerated criterion when sentencing a juvenile. Here, the trial court obviously *considered* the listed factors, but the Court of Appeals nevertheless reversed defendant's sentence and remanded for resentencing. The Court of Appeals erred both in finding that the law required explicit findings and in ordering resentencing 9

Standard of Review 9

Discussion 10

The uncertain case law in Michigan 10

Interpretation of similar laws in our sister states. 15

Application of the law to defendant's case. 16

(1) The first factor 17

(2) The second factor 17

(3) The third factor 18

(4) The fourth factor 18

(5) The fifth factor 18

(6) The sixth factor 19

Conclusion 19

Table of contents continued

Argument:

II. Nothing in statute or rule requires the court to allow allocution before deciding to sentence defendant as an adult. The Court of Appeals reversed and remanded because the trial court did not ask defendant to allocute before deciding to sentence him as an adult. The Court of Appeals erred reversibly by so ruling. 21

Standard of Review 21

Discussion 21

Argument:

III. Where a party voluntarily withdraws an issue from consideration by the decision maker, that issue is waived forever more. Although finding the Julie Bellhorn issue waived, as opposed to forfeited, the appellate court nevertheless held that this issue could be raised anew on remand proceedings. The Court of Appeals misapplied the waiver doctrine as announced by this Court in *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000). 28

Standard of Review 28

Discussion 28

Relief 31

Table of authorities

Case — **Page**

Butler v State,
324 Ark 685; 922 SW2d 685 (1996) 28

CM v State
884 SW2d 562 (Tex App, 1994) 15

Hill v United States,
368 US 424; 82 S Ct 468; 7 L Ed 2d 417 (1962) 25

In re Dana Jenkins,
438 Mich 364; 475 NW2d 279 (1991) 10

In re Echeverria,
141 Wash 2d 323; 6 P3d 573 (2000) 26

Mayne v State,
416 So 2d 741 (Ala, 1982) 15

People v Adams,
195 Mich App 267; 489 NW2d 192 (1992), *modified at* 441 Mich 915 (1993) 14

People v Armstrong,
175 Mich App 181; 437 NW2d 343 (1989) 13

People v Berry,
409 Mich 774; 298 NW2d 434 (1980),
overruled by People v Petit, 466 Mich 624; 648 NW2d 193 (2002) 24

People v Boclair,
225 Ill App 3d 331; 587 NE2d 1221 (1992) 26

People v Carter,
462 Mich 206; 612 NW2d 144 (2001) 2, 28, 29

People v Daniels,
192 Mich App 658; 186 NW2d 779 (1992) 14

People v Farmer,
30 Mich App 707; 186 NW2d 779 (1971) 16

Table of authorities continued

Case	Page
People v Grant, 445 Mich 535; 520 NW2d 123 (1994)	9
People v Gregory Petty, _ Mich _; 654 NW2d 328 (2002)	8
People v Hamm, 100 Mich App 429; 298 NW2d 896 (1980)	30
People v Hazzard, 206 Mich App 658; 522 NW2d 910 (1994)	10
People v Keithon Miller, 437 Mich 1049; 471 NW2d 620 (1991)	14
People v Krist, 107 Mich App 701; 309 NW2d 708 (1981), *reversed on other grounds at* 413 Mich 937; 320 NW2d 667 (1982)	14
People v Lyons, 203 Mich App 465; 513 NW2d 170 (1994)	10
People v Miller, 199 Mich App 609; 503 NW2d 89 (1993)	10
People v Ollins, 231 Ill App 3d 243; 606 NE2d 192 (1992)	15
People v Passeno, 195 Mich App 91; 489 NW2d 152 (1992), *overruled on other grounds* in People v Bigelow, 229 Mich App 218; 581 NW2d 744 (1998)	12
People v Petit, 466 Mich 624; 648 NW2d 193 (2002)	9, 22, 24
People v Ristich, 169 Mich App 754; 426 NW2d 801 (1988)	14

Table of authorities continued

Case	Page
People v Triplett, 432 Mich 568; 442 NW2d 622 (1989)	14
People v Thenghkam, 240 Mich App 29; 610 NW2d 571 (2000), *qualified by* People v Williams, 245 Mich App 427; 628 NW2d 80 (2001)	9, 12
State v Campbell, 90 Ohio St 3d 320; 738 NE2d 1178 (Ohio, 2000)	26
State v Fulton, 28 Kan App 2d 815; 23 P3d 167 (2001)	26
State v Lindsey, 203 Wisc 2d 423; 554 NW2d 215 (1996)	26
State v Simpson, 836 SW2d 75 (Mo App, 1992)	16
United States v Davis, 121 F3d 335 (CA 7, 1997)	30
United States v Leasure, 122 F3d 837 (CA 9, 1997)	25
United States v Lewis, 10 F3d 1086 (CA 4, 1993)	26
United States v Patterson, 128 F3d 1259 (CA 8, 1997)	26
United States v Riascos-Suarez, 73 F3d 616 (CA 6, 1996)	26
United States v Rodriguez-Velasquez, 132 F 3d 698 (CA 11, 1998)	26
United States v Stevens, 223 F3d 239 (CA 3, 2000)	26

Table of authorities continued

Court rules — **Page**

MCR 5.955 10

MCR 5.955(A) 10, 19

MCR 5.955(A)(1) 17

MCR 5.955(C) 26

MCR 6.425(D)(2)(c) 22

MCR 6.931(C) 4

MCR 7.212(C)(6) 5

MCR 7.301(2) 1

Statutes — **Page**

MCL 712A.2(a)(1)(A); MSA 27.3178(598.2)(a)(1)(A) 10

MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n) 10, 19

MCL 769.26; MSA 28.1096 26

Statement of jurisdiction

This Honorable Court has jurisdiction over this appeal from the decision by Court of Appeals under MCR 7.301(2).

Statement of questions presented

I. **Neither the court rule nor the statute requires the trial court to make findings of fact on each enumerated criterion when sentencing a juvenile. Here the trial court obviously considered the listed factors; nevertheless the Court of Appeals reversed defendant's sentence and remanded for resentencing. Did the Court of Appeals err both in finding that the law required explicit findings and in ordering resentencing?**

The trial court would say:	**"Yes."**
The People say:	**"Yes."**
The Court of Appeals would say:	**"No."**
Defendant will say:	**"No."**

II. **Nothing in the statutes or court rules requires the court to allow allocution before deciding to sentence defendant as an adult. The Court of Appeals reversed and remanded because the trial court did not ask defendant to allocute before deciding to sentence him as an adult. Did the Court of Appeals err reversibly by so ruling?**

The trial court would say:	**"Yes."**
The People say:	**"Yes."**
The Court of Appeals would say:	**"No."**
Defendant will say:	**"No."**

III. **Where a party voluntarily withdraws an issue from consideration by the decision maker, that issue is waived forever more. Although finding the Julie Bellhorn issue waived, as opposed to forfeited, the appellate court nevertheless held that this issue could be raised anew on remand proceedings. Did the appellate court misapply the waiver doctrine as announced by this Court in *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000)?**

The trial court would say:	**"Yes."**
The People say:	**"Yes."**
The Court of Appeals would say:	**"No."**
Defendant will say:	**"No."**

Summary of facts presented

This case received significant media attention because fifteen-year-old Gregory Petty was reported to be the youngest person ever in Michigan to receive a sentence of life without the possibility of parole for his first-degree murder conviction. It also received media coverage because a youth worker at the juvenile detention facility at which Petty was housed, a Ms. Julie Bellhorn, allegedly had sexual relations with Petty after which she "advised" Petty not to take the plea and sentence bargain offered him, and Petty followed that "advice" to his detriment.

Petty was teaching his twelve-year-old understudy, McKinley Moore, how to commit an armed robbery in an urban metropolis like Detroit. After Petty staked out their prey, the two waited at a nearby gas station until such time as they could "move in for the kill." After ordering what would literally be his "last supper," Mr. Calvin Whitlow exited the Highland Park Delicatessen and casually walked about waiting for his dinner to be prepared.

But as Whitlow exited the delicatessen, Petty gave the signal to his young understudy who then went into action. Moore came up behind Whitlow, produced a gun, and demanded Whitlow's money. As is oft-times the case, the crime did not go as planned. Instead of just handing over his money, Whitlow broke away and began darting in between cars in an effort to evade his assailant. Petty assisted Moore in cornering Whitlow, resulting in Whitlow's change of direction whereupon he made a straight bee-line down the street.

Whitlow began pulling away from Moore, so Moore stopped giving chase, readied his weapon, then fired one time, striking the fleeing Whitlow in the back of his head. As the fallen Whitlow lay motionless in the street in a pool of blood, Moore ran up to him and rifled through his pockets. Petty watched his understudy and called out instructions when necessary. Upon completion

of the taking, Moore ran off down the street. Not satisfied that Moore went through all of the slain Whitlow's pockets, Petty ran over to him as well and went through the pocket he supposed Moore had missed. After doing so, Petty picked up Whitlow's cell phone and made off with the loot.

Shortly after this murderous crime, a series of phone calls were placed to the Petty home and elsewhere with use of the Whitlow cell phone. Phone records were used at trial to establish these facts. Eventually, Petty returned home and hid the cell phone under the mattress of a baby's crib.

Having been identified by witnesses to these horrific events, the police questioned Petty in the presence of his mother. Petty gave the police several false exculpatory statements in an attempt to divert the attention of the police away from him. When these efforts appeared futile, Petty finally confessed, but only after his mother left the interrogation room. Based upon the information supplied to them by Petty, the police subsequently found Whitlow's cell phone right where Petty put it—in a crib, under a baby mattress, in the Petty home.

Upon due deliberation, the jury acquitted defendant of count one—second-degree murder—but found him guilty as charged on counts two through four—felony murder, armed robbery, and felony firearm. 21a-22a. A poll of the jury revealed that all agreed with this verdict. 23a-24a.

Immediately after the jury rendered their verdict, the court announced on the record the date for the dispositional/sentencing hearing at which time the court would decide whether to sentence defendant as an adult, or as a juvenile, thus complying with MCR 6.931(C). 24a-25a.

A dispositional hearing and a sentencing hearing were combined into one proceeding. 29a-118a. The Court took testimony from Diane Woodson (employed by the State of Michigan, who was working in the Wayne County Adult Probation Department—she prepared defendant's presentence

report), Anthony Keeling (employed by the Forensic Center of the 3rd Judicial Court for the County of Wayne), Sylvia Haikio (employed by the 3rd Judicial Court for the County of Wayne, Family Davision, Juvenile Section), and Reginald Whitlow (a spoke person for the family of the victim). 30a, 101a. After the last witness testified at the dispositional/sentencing hearing, the following occurred:

> THE COURT: Thank you. You may step down.
>
> All right, that concludes your presentation Mr. Yaldoo?
>
> MR. YALDOO: That is [sic], Your Honor.
>
> THE COURT: Mr. Bradfield?
>
> MR. BRADFIELD: One moment Your Honor.
>
> Your Honor, we have nothing to add to the presentation. [105a.]

After argument from both sides, the trial court pronounced defendant's disposition, taking into consideration the criteria listed in the statute and court rule. 105a-117a. After deciding to sentence defendant as an adult, the trial court imposed the statutorily mandated life without parole sentence for defendant's first-degree murder conviction. 117a. The court did not again give the defense the opportunity to allocute *immediately prior to the imposition of sentence*, as opposed to, and distinct from, the court's dispositional ruling. *Id.*

Defendant appealed as of right and, while the trial court had concurrent jurisdiction with the Court of Appeals, he filed a Motion to Vacate Conviction and/or for an Evidentiary Hearing, with a Brief in Support. 119a-151a. The basis for the motion was an allegation that a social worker, Julie Bellhorn, employed at the youth home in which defendant was housed, "advised" defendant to refuse

to accept the prosecution's plea offer. The motion stated that *"[d]espite recommendations by his mother* and attorney that he accept the agreement [defendant] declined the offer and proceeded to trial." 124a. It was further alleged that Bellhorn had sexual relations with defendant. 124a-125a. The People responded to the motion, essentially agreeing to an evidentiary hearing so that the matter could be fully explored. 152a-157a.

The author of the defense motion was *not* the attorney who handled proceedings in the trial court. That attorney investigated the allegation in preparation for proceedings in the trial court, and at some point during that investigation, contacted the People's representative to inform them that there was an ethical issue that prevented counsel from pursuing the motion and hearing. Consequently, that attorney prepared a Stipulation and Order to dismiss the Motion. The Stipulation was signed by the parties; thereafter the trial court dismissed the motion and the request for an evidentiary hearing. 158a-161a.

Not long thereafter, the defense then filed a Motion to Remand for Resentencing in the Michigan Court of Appeals. 162a-174a.[1] The motion raised the Bellhorn issue again. 166a-169a. It then stated that "[t]he motion was dismissed by stipulation of the parties..." and that defendant "...did not withdraw it because the factual basis for it was untrue." *Id.*

The Bellhorn issue was raised in the context of a claim that defendant's sentence was based upon inaccurate information. It was alleged that psychologist "Anthony Keeling testified numerous times that defendant's acting out behavior was the result of psychosexual conflicts related to adult

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[1]Appendices A and B to the motion are not included as such in appellant's Appendix as the same material is included elsewhere in the Appendix. See 29a-118a and 119a-151a.

female caretakers." 167a. The defense sought to connect the Bellhorn issue with Keeling's testimony.

In addition to the Bellhorn issue, defendant argued that he was entitled to be resentenced because the trial court did not "...articulate all the factors that must be considered before imposition of an adult sentence in a designated case..." and because of the trial court did not give defendant and his counsel an opportunity to allocute prior to the imposition of sentence. 169a-170a.

The People opposed all bases for the motion, arguing that the defense mischaracterized Keeling's testimony, that the defense was given an opportunity to allocute before the imposition of sentence, and that the court's sentence was not invalid. 175a-189a.

The Court of Appeals denied the Motion to Remand for Resentencing. 190a. In their subsequent Opinion on the merits, the court reversed defendant's sentence and remanded for resentencing. 200a-201a. *The basis for the reversal was that the trial court did not articulate on the record the six criterion that the court had to consider when sentencing defendant*. 193a-196a. And although finding the issue moot in light of their ruling, the court also found that *defendant was denied a "reasonable opportunity" to allocute before the imposition of sentence*. 198a. Because it was remanding for resentencing, the Court of Appeals ordered the trial court to give defendant the opportunity to allocute *before the trial court decided anew whether or not to sentence defendant as an adult*. 198a-199a. Lastly, the court found that the Bellhorn issue and claim made thereon—that defendant's sentence was invalid because it was based upon inaccurate information—while waived for purposes of defendant's appeal of right to the Court of Appeals, *was not so for purposes of the proceedings on remand*. 198a.

The People filed a timely application for leave to appeal, which this Court granted in an order dated October 30, 2002.[2] 201a.

This is the People's brief after the granting of leave.

[2]People v Gregory Petty, _ Mich _; 654 NW2d 328 (2002).

Argument

I. Neither the court rule nor the statute requires the trial court to make findings of fact on each enumerated criterion when sentencing a juvenile. Here, the trial court obviously *considered* the listed factors, but the Court of Appeals nevertheless reversed defendant's sentence and remanded for resentencing. The Court of Appeals erred both in finding that the law required explicit findings and in ordering resentencing.

Standard of review

Because no objection was lodged below citing as its basis the claim defendant now makes on appeal, review is for plain error.[3]

Had the claim been preserved, then statutory construction or interpretation of a court rule is reviewed *de novo*.[4] Ordinarily, where preserved, this Court uses the clearly erroneous standard to review a trial court's findings of fact when sentencing a juvenile as an adult. A finding is clearly erroneous if, after a review of the entire record, the court is left with a definite and firm conviction that a mistake has been made.[5] The abuse of discretion standard is used to review of the trial court's ultimate decision to sentence a juvenile as an adult.[6]

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[3]*People* v *Grant*, 445 Mich 535; 520 NW2d 123 (1994).

[4]*People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

[5]See *People* v *Thenghkam*, 240 Mich App 29, 41-50; 610 NW2d 571 (2000), *qualified by People v Williams*, 245 Mich App 427, 434-439; 628 NW2d 80 (2001) (noting that the *Thenghkam* opinion was flawed).

[6]*Id.*

Discussion

A. The uncertain case law in Michigan

The governing law applicable to the sentencing of juveniles differs depending on the type of crime committed, how the prosecution elects to proceed, and the pretrial rulings of the trial court.

In this case defendant committed one of the designated felonies listed in MCL 712A.2(a)(1)(A);MSA 27.3178(598.2)(a)(1)(A)—first-degree felony murder. Nevertheless, the prosecution elected to file a petition in family court instead of filing a complaint and warrant in the district court, thereby preserving sentencing options for the trial court. Consequently, upon defendant's conviction, the sentencing court had the discretion to sentence defendant as an adult, a juvenile, or to give him a blended sentence. After presiding over the required hearing, the trial court exercised its discretion to sentence defendant as an adult. The Court of Appeals held that it was reversible error for the trial court to have failed to make findings of fact on each enumerated criterion. The People disagree.

It is axiomatic that a trial court loses jurisdiction to resentence a defendant unless the originally imposed sentence is invalid.[7] The holding of the Court of Appeals was that this sentence was invalid because the trial court did not make findings of fact on each of the criterion listed in MCR 5.955 and MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n). But neither the court rule nor the statute requires explicit findings as such.

Section (A) of MCR 5.955,[8] which is based upon its statutory corollary, reads as follows:

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[7]*In re Dana Jenkins*, 438 Mich 364, 369; 475 NW2d 279 (1991), n 3.

[8]The court rule's citation to Michigan Compiled Law 712A.18 appears to refer to subsections "l" (as in lucky) and "n" (as in no). The People believe this is a typo, and should

> If a juvenile is convicted under MCL 712A.2d; MSA 27.3178(598.2d), sentencing or disposition shall be made as provided in MCL 712A.18(l)(n); MSA 27.3178(598.18)(1)(n). In deciding whether to enter an order of disposition, or impose or delay imposition of sentence, the court shall *consider* all the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:
>
> (1) the seriousness of the alleged offense in terms of community protection, including but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the effect on any victim;
>
> (2) the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;
>
> (3) the juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior;
>
> (4) the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming;
>
> (5) the adequacy of the punishment or programming available in the juvenile justice system;
>
> (6) the dispositional options available for the juvenile.

This Court should note that the rule requires mandatory *consideration* of these factors, but no where is it mandated that the trial court *make findings of fact as to each and every criterion, on the record, at sentencing.* This "requirement," that the trial court make findings of fact on the record as to each and every criterion listed in the court rule and statute or risk having the case remanded for

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read the number 1, followed by the letter n. For confirmation, see the citation to the Michigan Statute Annotated.

resentencing, has been read into the rules by the Court of Appeals starting with the *obiter dictum* in *People v Passeno*:[9] "First, the trial court's findings of fact supporting its determination *regarding each of the factors* enumerated in M.C.L. § 769.1(3); M.S.A. § 28.1072(3) should be reviewed under the 'clearly erroneous' standard of MCR 2.613(C)." Emphasis supplied. Even though *Passeno* did not hold that the court's failure to render findings of fact on each applicable criterion rendered the imposition of sentence invalid, this is how *Passeno* has been construed. See, eg, *People v Miller*,[10]citing the *Passeno* language for the standard of review; *People v Lyons*,[11] (again citing *Passeno*); *People v Hazzard*,[12] (not citing any case in support of the holding, although *Passeno* is cited in connection with the abuse of discretion standard), and *People v Thenghkam*,[13] ("Even assuming that the trial court's scant findings *touched on every factor* and were not clearly erroneous..."), emphasis supplied. See also defendant's argument to the Court of Appeals, citing *Thenghkam* and *Hazzard* for the proposition that a resentencing is required where the trial court fails to make findings of fact on each criterion listed in the statute and court rule.

To be sure, the statute and court rule mandate the trial court to *consider* all of the criteria before imposing sentence. But neither supports the view that a resentencing is *required* if the trial

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[9]*People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992), *overruled on other grounds* in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

[10]*People v Miller*, 199 Mich App 609, 612; 503 NW2d 89 (1993).

[11]*People v Lyons*, 203 Mich App 465, 468; 513 NW2d 170 (1994).

[12]*People v Hazzard,* 206 Mich App 658; 522 NW2d 910 (1994).

[13]*People v Thenghkam*, *supra* at 240 Mich App 67,

court so much as fails to make a finding of fact on any one of the criteria, or makes an "insufficient" finding on one or more.

The People are mindful of a reviewing court's duty to review of a lower court's rulings in general. A requirement that the trial court render findings of fact on each criterion listed in the statute and court rule, on the record at the time of sentencing, concededly facilitates appellate review. As a matter of philosophy, the People do not want to impede this process. But the People assert that a more moderate approach to this subject can, and should be, applied—*one that applies the law as it is written*, and balances the rights of the defendant with the efficient operation of the administration of justice.

This Court should apply the rule of law that finally emerged, after years of debate, with regard to a reviewing court's scrutiny of a trial court's findings of fact in a bench trial where the trial court did not render findings on each and every element of the offense. Arguably, a trial court's findings of fact with regard to the elements of the offense charged is of greater importance than a court's findings of fact on the criteria for determining whether to sentence a juvenile as an adult. Yet our courts were able to reach a middle ground that protected the rights of the accused, while at the same time rendering the administration of justice more efficient. Thus, in *People v Armstrong*,[14] the court said:

> The purpose of requiring specific factual findings in a nonjury case is similar to the function served by the trial court's charge in a jury case. It allows the appellate court to review the law applied by the fact finder. *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973). *Generally, where the factual findings are insufficient, the appropriate remedy is to remand the cause for additional factfinding.*

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[14]*People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989).

> *Id.*, p 628. *But, a remand is unnecessary "where it is manifest that [the judge] was aware of the factual issue, that he resolved it and it would not facilitate appellate review to require further explication of the path he followed in reaching the result." Id.*, p 627, n 3. [Emphasis supplied]

Such a rule should be applied to review of a trial court's exercise of discretion at a juvenile's sentencing hearing. After all, a resentencing is not required where, under the pre-legislative enactment of the guidelines into law, a trial court fails to state its reasons for exceeding the guidelines, either on the record[15] or on the sentencing information report (SIR)[16] at the time of sentencing. Similarly, where a challenge is made to information contained in a presentence report and the trial court does not indicate how it resolved the matter or whether it played a part in the court's sentence, a resentencing is *not* what is automatically ordered.[17] Neither should it be here. And because there is no requirement that the sentencing court make findings of fact on each criterion, the substantial compliance doctrine does not apply. The doctrine only would come into play if the law required the trial court to make findings of fact on each factor.[18]

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[15]*People v Triplett*, 432 Mich 568; 442 NW2d 642 (1989).

[16]*People v Keithon Miller*, 437 Mich 1049; 471 NW2d 620 (1991); *People v Adams*, 195 Mich App 267, 285; 489 NW2d 192 (1992), (Griffin, J., concurring in part and dissenting in part), *modified by* 441 Mich 916; 497 NW2d 182 (1993).

[17]*People v Ristich,* 169 Mich App 754, 759; 426 NW2d 801 (1988) ("We see no need, if we may borrow Justice Blackmun's metaphor from his *Tucker* dissent, to engage the trial court in the futile exercise of marching up the sentencing hill again, only to hand out the same sentence and march back down again."); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992); *People v Krist*, 107 Mich App 701, 704-706; 309 NW2d 708 (1981), *reversed on other grounds at* 413 Mich 937; 320 NW2d 667 (1982).

[18]If this Court upholds the heretofore judicially created requirement that a trial court must make findings of every criterion or risk a resentencing, then the People take the position that the trial court here substantially complied with this requirement.

B. Interpretation of similar laws in our sister states.

A few other States with similar statutory criteria or factors have held, with respect to the sentencing decision relating to juveniles, or the decision to waive the juvenile to the adult courts, or the decision to transfer the case back to juvenile court, that, while the court must *consider* all of the factors or criteria, it *need not* make specific findings of fact as to each.

For instance, in *Mayne v State*[19], the court held that:

> There is no requirement that the transferring court make a specific finding on each of the six factors to be considered under [Alabama Code 1975] sec 12-15-34(d), only that the order contain some statement that those factors were considered in order that the appellate courts can make a determination that the requirements of the statute have been met.

So too with the court in *CM v State*:[20]

> [A]lthough the trial judge, in determining whether to transfer the case from juvenile to district court, must consider factors listed in the statute, affirmative finding on each factor is not required.

Yet again, the court in *People v Ollins*[21] said that:

> [D]iscretion of the trial court in evaluating an individual for transfer from a juvenile system to criminal system does not mandate the trial judge to enunciate individual considerations of statutory factors; rather, the trial court must weigh and balance carefully all statutory and nonstatutory factors presented.

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[19]*Mayne v State,* 416 So 2d 741, 742 (Ala, 1982).

[20]*CM v State,* 884 SW2d 562, 564 (Tex App, 1994).

[21]*People v Ollins,* 231 Ill App 3d 243; 606 NE2d 192, 197 (1992).

Finally, the court in *State v Simpson*[22] held that in determining whether a juvenile should be dealt with under the juvenile code, it is not necessary for the court to give equal weight to each of eight statutory factors, nor necessary for the court to make express findings of fact on each factor.

C. Application of the law to defendant's case.

Whether reviewing this issue *de novo* or for plain error affecting substantial rights, the sentencing court did *not* impose a sentence that was invalid. The Michigan statute and court rule require the trial court to *consider* the six sentencing factors, giving the greatest weight to the seriousness of the offense and the juvenile's record. There simply is *no* requirement that the trial court make specific findings of fact on each criterion or risk having the case remanded for resentencing.

Where the record is silent as to whether the trial court considered *all* of the factors, the ordinary presumption—that the court has followed the law in the absence of proof to the contrary—should apply.[23] Therefore, even where the record is silent, or one perhaps not as detailed as a reviewing court would like, the trial court should be presumed to have *considered* the relevant criteria, which is all that the law requires.

Here, there can be no serious challenge that the trial court did not *consider* the relevant factors. Indeed, in the lower court's opinion, the Court of Appeals conceded that "a fair reading of the trial court's remarks at sentencing arguably establishes that [the sentencing court] made the relevant considerations..." As will be seen below, this was a concession the court had to make.

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[22]*State v Simpson,* 836 SW2d 75, 82 (Mo App, 1992).

[23]*People v Farmer,* 30 Mich App 707; 186 NW2d 779 (1971).

(1) The first factor—the seriousness of the offense in terms of community protection.

The sentencing court *considered* this factor as evidenced by the court stating that:

- → it had "...to look at how a sentence as an adult versus disposition as a juvenile will impact the community;"
- → "[t]he court...had a chance to hear quite eloquently from the family of the victim[;]"
- → "...the jury found Mr. Petty guilty of [first-degree] murder. There is no more serious crime[;]"
- → "[t]he jury also found that even though [defendant] was not the actual person who fired the weapon that resulted in the death of Mr. Whitlow...he was responsible for that."

114a-117a. Although perhaps not "findings" *per se*, these remarks evidence that the court was aware of MCR 5.955(A)(1) and *considered* factor number one.

(2) The second factor—defendant's culpability.

The second factor was *considered* by the court as evidenced by this remark:

- → "[t]he jury also found that even though [defendant] was not the actual person who fired the weapon that resulted in the death of Mr. Whitlow, he [the defendant] was responsible for [Whitlow's murder]."

Id. What the court could have added was that defendant was the older between the two, and put Moore up to the dastardly deed. Casey Durham's impeachment testimony, to the effect that defendant grabbed the gun from Moore after Moore murdered Whitlow and asked "Why did you kill him?", while certainly suggestive that defendant did not premeditate this murder, implies, when considered in combination with the video, that defendant organized and planned this despicable crime and put Moore up to committing it. The sentencing court duly *considered* this factor.

(3) The third factor—defendant's prior record.

The court *considered* this factor as evidenced by these following remarks:

> → "The record of Mr. Petty, the juvenile record, certainly reflects a number of contacts. I was a little surprised at some of the testimony offered this morning[;]"
>
> → "To read a [presentence] report that says there was a dismissal or there was — there's insufficient evidence does not begin to tell the whole story. What I have though based on that [sic] information that's in the file, based on these reports is there has been [consistent] contact with this Court that has resulted in not one, but now two convictions. One for carrying a concealed weapon and now this one, which includes — actually three convictions for various felonies including murder one."

Id. The trial court did *consider* this third factor.

(4) The fourth factor—the juvenile's programming history.

The sentencing court *considered* this factor as evidenced by the following remark:

> → "[He (the defendant) has] not been successful in the programming requirements relative to this matter."

Id.

(5) The fifth factor—the adequacy of punishment or programming available in the juvenile justice system.

This factor was *considered* by the court as evidenced by the following remarks:

> → "Mr. Bradfield [defendant's trial counsel] argued that there is sufficient juvenile programming available to assist Mr. Petty. I don't really think that's controverted. The question is did the witnesses come forward with ambiguous recommendations about — Judge, I think that he ought to be in a juvenile system, but I think he needs to be in there longer than what law will allow for a juvenile then you are saying to this Court that the only option we have available is the adult sentence."

Id. The fifth factor was duly *considered* by the sentencing court.

(6) The sixth factor—the dispositional options available for the juvenile.

The sixth factor was *considered* by the court as evidenced by the following:

→ "If the juvenile disposition will not be sufficient[,] then from where I sit there is no alternative."

Id.

Conclusion

By law, the sentencing court must give *greater weight to the seriousness of the offense and the juvenile's record.*[24] First-degree murder is, quite obviously, the most serious offense defendant could have committed. And when conjoined with defendant's prior record, it is clear that the trial court did not abuse his discretion when sentencing this defendant.

Defendant's prior criminal history is perhaps best summed up by his previous counsel's statement of facts in her brief on appeal filed in defendant's previous petition (see 6a-7a):

> On July 24, 1997, the Respondent herein, Gregory Petty, plead guilty on a petition alleging carrying a concealed weapon. Another petition charging Violation of the Controlled Substance Act/Possession of Marijuana, Curfew Violation, Resisting and Obstructing a Police Officer and Miscellaneous Misdemeanor Offenses was dismissed. The disposition in this matter was adjourned until after the respondent's trial on petition alleging Criminal Sexual Conduct, First Degree. The Court requested a report from the probation department and the Wayne County Clinic for Child Study.
>
> On August 27, 1997, the respondent was tried on the charge of Criminal Sexual Conduct, First Degree, before Mary Ann Quinn, a Referee of the Wayne County Probate Court, Juvenile Division.

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[24]See MCR 5.955(A); MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n).

Following testimony, the Court found that the People did not prove that the Defendant was guilty and, therefore, the petition alleging Criminal Sexual Conduct was dismissed.

Immediately following this trial the court commenced disposition on the carrying of a Concealed Weapon Charge. The people called a witness, Detective Howard of the Highland Park Police Department. The purpose stated by the Prosecutor was for the Detective to testify about "other problems that might have arisen."

The Detective testified that he had information that the respondent was involved with a vehicle that crashed while trying to get away from the police. The officer stated this incident occurred around "Halloween." He also testified that the respondent was involved in a curfew violation and a high speed chase in July.

On cross examination, the Detective testified he was "not really sure" of the details of the high speed chase or even when it occurred. The detective also testified that Respondent was a suspect in other cases, but "nothing that was actually confirmed."

The respondent's attorney then requested the Court to follow the Clinic recommendation and place the respondent on probation with counseling. The Court stated that "Uhm, I have just listened to...we know that he is here for carrying a concealed weapon, we know that he violates curfew, uhm, and we listened to two hours of testimony today where *he* [was] with two other boys [and] *is clearly in a house with no adult supervision where a girl alleges that she has been molested.* Now I find him not guilty of the molesting, but *I am having great difficulty with the level of supervision that is provided,* that he either went to that house or that his mother has not sufficiently been able to instill in him the need to leave when there is no adult supervision; and that appears to not to have taken place. Uhm he has, uh, advised the Court's probation officer that, uh, he has a history of smoking marijuana and he was used it since he was thirteen years old, and he denies other drugs, with the exception of alcohol; and the Court notes that he is considerably under the age for the use of the legal substance. They have recommended probation for Gregory, I don't see anything that argues probation for him." The referee then committed the respondent to the Family Independence Agency for placement. [Citations omitted, emphasis added].

This information was in the court file and it must be presumed that it was reviewed by the trial court.[25] When the trial court's remarks are reviewed in connection with the criteria outlined in the statute and court rule, it is clear that the trial court fulfilled its legal duty to *consider* the relevant factors before deciding to sentence defendant as an adult. And because neither the statute nor the court rule *requires* the trial court to make specific findings of fact on each factor—on the record at the time of sentencing or risk having the case remanded for resentencing—the Court of Appeals erred reversibly by *sua sponte* amending the statute and court rule to make this requirement law.

The simple fact of the matter is that the trial court here did exactly what it was supposed to do—*consider* the relevant factors when exercising its discretion at sentencing. Therefore, a remand for resentencing is completely unwarranted here.

Should this Court disagree with the People's argument, or perhaps in future cases where the record is not as clear as that currently before the Court (or where there is no record at all to review), the People argue now, as they did in the court below, that, at most, defendant is entitled to a remand *for the limited purpose* of having the trial court amplify the reasons it exercised its discretion in the manner called into question on appeal. This is the remedy the courts apply in other circumstances and there is no good reason to treat this issue any differently. Accordingly, if this Court is of the view that the trial court did not sufficiently establish that it considered the relevant criteria, then the remedy is to remand to the trial court for that court to establish that it *considered* the appropriate criteria when sentencing defendant.

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[25]The People have a copy of defendant's presentence report. It has not been included in this public document due to confidentiality concerns. Nor is it included in the Appendix as it arguably is not directly relevant to the issues in this case. The People will make this report available under separate cover if this Court would like to have it at its disposal.

Argument

II. Nothing in the statute or court rule requires the sentencing court to allow allocution before deciding whether to sentence defendant as an adult. The Court of Appeals reversed and remanded because the trial court did not ask defendant to allocute before deciding to sentence him as an adult. The Court of Appeals erred reversibly by so ruling as there is no legal basis to support the appellate court's ruling.

Standard of review

There was no objection to this omission by the trial court before imposing sentence, so review is for plain error affecting substantial rights.[26]

Discussion

Without regard to the change over the years in the language of MCR 6.425(D)(2)(c),[27] there could scarcely be an error more harmless than a trial court's failure to provide defendant with an opportunity, reasonable or otherwise, to allocute before the imposition of a sentence that is *mandated* by statute—in this case life without parole— or in other circumstances, say, where the sentence is agreed upon by the parties in advance of sentence. Yet this is precisely the ground upon which, in part, the Court of Appeals based its decision to remand for resentencing *with instructions for the trial court to allow defendant to allocute before deciding anew whether to sentence defendant as an adult, or otherwise.* Like that preceding it, this aspect of the appellate court's ruling is clearly erroneous and without any precedent in law.

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[26]See fn 3.

[27]*People v Petit, supra* at 631-633.

To be precise about our facts, the following is what transpired towards the end of the dispositional hearing (or the hearing to determine whether or not the defendant should be sentenced as an adult):

> THE COURT: Thank you. You may step down.
>
> All right, that concludes your presentation Mr. Yaldoo?
>
> MR. YALDOO: That is [sic], Your Honor.
>
> THE COURT: Mr. Bradfield?
>
> MR. BRADFIELD: One moment Your Honor.
>
> Your Honor, we have nothing to add to the presentation. [105a].

The Court then proceeded to give reasons why it was going to sentence defendant as an adult. See Argument I., *supra*; 114a-117a. In the process of doing so, the court imposed sentence without again addressing the defense with regard to allocution.

Resolution of this issue depends upon whether this Court views the dispositional/sentencing hearing as one, or two distinct and separate, hearings. If the former, then no error occurred. If the latter, then error presumably occurred, but it is harmless.

Viewing the hearing as a single unit, the exchange quoted above evidences that the court gave the defense the *opportunity* to allocute or to call witnesses they thought might be helpful, for it is reasonable to assume that when Mr. Bradfield requested of the court an extra moment or two, he did so in order to confer with defendant about these very subjects. Defendant declined the offer. Having done so, the People fail to see how any reversible error occurred here.

This Court recently decided *People v Linda Petit, supra.* Recognizing the change in the language of the applicable court rule over the years, this Court rightly held that at sentencing a defendant is entitled simply to the *opportunity* to address the court. In so doing, this Court overruled *People v Berry,*[28] which had automatically required a remand for resentencing whenever, and no matter what the circumstance, a trial court failed to specifically address defendant with regard to allocution before imposing sentence. And this Court understandably questioned the continuing viability of *Berry* as applied to Petit's case—a case in which the parties entered into a sentence bargain.

Application of *Petit* to the instant case leads to the conclusion that no error occurred *if* the hearing is viewed as unitary. If the sentencing proceeding here is viewed as containing two separate hearings, then error presumably occurred,[29] but only as to the lack of an opportunity for allocution before sentence was imposed. If so, it must be deemed harmless for there could scarcely be a better scenario for application of the doctrine than that presented by this case, not to mention the *Petit* case. The harmless error argument presented by the People in *Petit*, a portion of it is provided below, applies with equal force here.

The United States Supreme Court has held that the common law right of allocution is not a right of either constitutional or jurisdictional magnitude. Thus, in *Hill v. United States,*[30] the defendant made a collateral attack on his sentence because the sentencing court did not ask him

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[28]*People v Berry*, 409 Mich 774; 298 NW2d 434 (1980), *overruled by People v Petit*, 466 Mich 624; 648 NW2d 193 (2002).

[29]An argument could be made that the opportunity to address the court still existed even though the court went directly from his dispositional rulings to pronouncing sentence. However, this could always be said in every case and thus, might appear too encompassing.

[30]*Hill v United States*, 368 US 424; 82 S Ct 468; 7 L Ed 2d 417 (1962).

whether he wished to make a statement on his own behalf before the imposition of sentence. Our Nation's highest Court held that the "failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus."[31] Despite the acknowledged omission by the sentencing court, our High Court found the omission was neither jurisdictional nor constitutional— it was not a fundamental defect which inherently resulted in a complete miscarriage of justice, nor was it an omission inconsistent with the rudimentary demands of fair procedure.[32]

Further support for some sort of a harmless error rule can be found in several federal circuits who have consistently applied such a rule under similar circumstances. For instance, the ninth circuit has held that a defendant is not entitled to resentencing unless he can identify on appeal specific statements that would have made a difference in the outcome of sentence.[33] The People do not now advocate for this specific test other than its ability to find harmless error if a violation is said to have occurred. The eleventh circuit has held that a resentencing is appropriate only where failing to do so would result in some sort of "manifest injustice."[34] Other federal circuits,[35] and state courts

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[31] *Hill*, *supra* at 428.

[32] *Id.*

[33] *United States v Leasure*, 122 F 3d 837, 841 (CA 9, 1997).

[34] *United States v Rodriguez-Velasquez*, 132 F 3d 698, 700 (CA 11, 1998).

[35] See *United States v Riascos-Suarez*, 73 F 3d 616, 627 (CA 6, 1996); *United States v Lewis*, 10 F 3d 1086, 1092 (CA 4, 1993); *United States v Patterson*, 128 F3d 1259 (CA 8, 1997); *United States v Stevens*, 223 F3d 239 (CA 3, 2000).

alike,[36] have ruled harmless the trial court's omission in failing to personally address a defendant before imposing sentence.

This Court should review the trial court's unchallenged omission for plain error. The opportunity for allocution is, after all, a procedural rule, not a constitutional right under either the federal or state constitutions. Moreover, by statute, no error in Michigan requires relief unless it results in a miscarriage of justice.[37]

Defendant here chose not to speak or call witnesses in his behalf at the most important part of the bifurcated sentencing hearing—at the dispositional stage. Failing to act then, defendant's fate was sealed once the trial court exercised its discretion to sentence him as an adult.

MCR 5.955(C) states in pertinent part that:

> If the court determines that the juvenile should be sentenced as an adult, either initially or following a delayed imposition of sentence, the sentencing hearing shall be held in accordance with the procedures set forth in MCR 6.425.

Thus, if the hearing in the instant case is viewed as two distinct entities, and if it was error for the trial court not to have addressed the defense with regard to allocution prior to the imposition of sentence, the court's omission resulted in no miscarriage of justice. Logic dictates that, at most, the court's omission has to be harm*less* given the lack of discretion that the court had when imposing sentence.

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[36]For state based decisions, see e.g., *State v Campbell*, 90 Ohio St 3d 320; 738 NE2d 1178 (2000); *In Re Echeverria*, 141 Wash 2d 323; 6 P3d 573 (2000); *State v Fulton*, 28 Kan App 2d 815; 23 P3d 167 (2001); *State v Lindsey*, 203 Wisc 2d 423; 554 NW2d 215 (1996); *People v Boclair*, 225 Ill App 3d 331; 587 NE2d 1221 (1992).

[37]MCL 769.26; MSA 28.1096.

Under either scenario described above, the Court of Appeals clearly erred in remanding for resentencing with instructions to the trial court for it to address defendant with regard to allocution *prior to deciding anew whether to sentence defendant as an adult*. This mandate is completely without precedent and should be reversed.

Argument

III. Where a party voluntarily withdraws an issue from consideration by the decision maker, that issue is waived forever more. Although finding the Julie Bellhorn issue waived, as opposed to forfeited, the appellate court nevertheless held that this issue could be raised anew on remand proceedings. The Court of Appeals misapplied the waiver doctrine as announced by this Court in *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000).

Standard of review

No level of review whatsoever is allowed for this claim as it was withdrawn by defendant.[38]

Discussion

After defendant was convicted, sentenced, and claimed an appeal as of right, he filed a Motion to Vacate Conviction and/or for an Evidentiary Hearing in the trial court while it had concurrent jurisdiction with the Court of Appeals. 119a-151a. The People answered, conceding that a hearing was the appropriate way to proceed. 152a-157a.

But after further investigation into the matter, defendant's counsel came to the People's advocate asserting that she could not proceed with the motion for ethical reasons.[39] Consequently, counsel prepared a stipulation agreeing to the dismissal of defendant's motions, which the parties signed. 158a. The parties had an in chambers meeting with the trial court on this same date,[40] at

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[38]*People v Carter*, 462 Mich 206; 612 NW2d 144 (2001).

[39]On information and belief, the People believe that the ethical consideration confronting counsel was going forward with the motion even though defendant's mother was the one who adamantly refused to allow her son to take the People's plea offer. Compare the allegations made at 119a *et seq* and 162 *et seq*, with *Detroit Free Press* article dated February 10, 2000. The precise reason is irrelevant however, as the motion was withdrawn by counsel.

[40]See 160a.

which time counsel advised the court of its ethical dilemma. Obviously the trial court could not let the matter proceed, so it was agreed that the matter would be withdrawn. Subsequently, counsel prepared an order for dismissal of the motions, which the court signed and had entered into the record. 161a.

To the People's surprise, defendant tried to resurrect the Bellhorn issue while the Court of Appeals had exclusive jurisdiction. 66a-168a. The People strenuously objected for the obvious reasons. 175a-189a. The Court of Appeals subsequently denied defendant's motion to remand. 190a.

But the Court of Appeals later issued their Opinion reversing defendant's sentence and remanded with specific instructions to the trial court. 191a-200a. Part of those instructions involved the Bellhorn issue. While the court acknowledged that the Bellhorn issue had been waived by counsel, *the court ruled that it was waived only for purposes of defendant's appeal to the Court of Appeals*. Because the court was reversing and remanding, reasoned the court, defendant could raise the claim anew, citing this Court's decision in *People v Carter, supra* as support. 198a.

The court's ruling is mystifying to say the least, and is in direct conflict with *People v Carter, supra*,[41] where this Court said:

> Waiver has been defined as 'the "intentional relinquishment or abandonment of a known right."' [*People v Carines*, 460 Mich 750, 762-763, n. 7, (1999), quoting *Olano v United States*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).] It differs from forfeiture, which has been explained as 'the failure to make the timely assertion of a right.' *Id.* '*One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.*' *United States v. Griffin*, 84 F.3d 912, 924 (C.A.7, 1996), citing *Olano, supra* at

[41] *People v Carter, supra*, at 215. Emphasis supplied.

> 733-734, 113 S.Ct. 1770. Mere forfeiture, on the other hand, does not extinguish an 'error.' *Olano, supra* at 733, 113 S.Ct. 1770; *Griffin, supra* at 924-926.

The People think it fair to say that when this Court made the ruling emphasized above, it did not mean that defendant's waiver of an issue applied only on direct review proceedings, but rather that, once waived, the issue is withdrawn forever more.[42]

While the Court of Appeals' Opinion is unpublished, if left to stand the ruling may be cited for the proposition that waiver applies only to direct appeal proceedings and may not act as a bar to review in any other context. This is a ruling clearly at odds with reason and common sense. Like those preceding it, reversal of the court's ruling in this regard is clearly in order.

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[42]Absent ineffective assistance of counsel for waiving the issue waived, or new original proceedings (as where an issue is waived during the first trial, and on appeal, defendant is given a new trial, eg *People v Hamm*, 100 Mich App 429, 434-435; 298 NW2d 896 (1980), absent extraordinary circumstances, defendant's waiver of his right to a jury trial is not binding in his second trial, ordered after appellate review). See generally *United States v Davis*, 121 F3d 335, 338-339 (CA 7, 1997), (an appellate court reviews forfeiture of a right, ie, the simple failure to assert that right, for plain error, but when right is waived, it is not reviewable, even for plain error).

Relief

WHEREFORE, the People respectfully request this Honorable Court to reverse those portions of the opinion by the Michigan Court of Appeals as challenged herein, and by so doing, affirm defendant's convictions and sentence.

Respectfully submitted,

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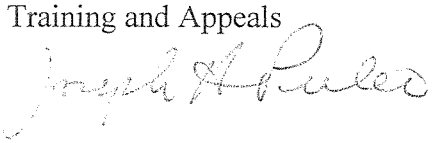

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Dated: January 5, 2003
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